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MERRITT COLLEGE
and SHIRLEY MACK

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ELIZABETH SANTOS

Plaintiff,

vs.

MERRITT COLLEGE, SHIRLEY MACK, an individual and DOES 1-10, inclusive,

Defendants.

CASE NO. C 07 5227 EMC

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Date: January 3, 2008
Time: 2:30 p.m.
Judge: Hon. Edward M. Chen
Location: Courtroom C, 15th Fl.

Accompanying Papers:
Declaration of Alyson Cabrera

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I. INTRODUCTION

Plaintiff ELIZABETH SANTOS' ("Plaintiff") Opposition to the instant motion provides zero response to the majority of the arguments advanced by Defendants MERRITT COLLEGE and SHIRLEY MACK (collectively "Defendants"), including those pertaining to dismissal of Plaintiff's claims for violation of 42 U.S.C. Section 1981. With respect to the few issues addressed by Plaintiff, her Opposition is barren of supporting authority, and is insufficient to raise any legal challenge to Defendants' motion. Plaintiff has not, and cannot, plead facts to demonstrate the existence of an employment relationship between Plaintiff and Defendants, and accordingly, her claims under the Fair Employment and Housing Act ("FEHA") fail as a matter of law. Plaintiff also has not, and cannot, plead facts to demonstrate compliance with the requirements of the Tort Claims Act.

II. LEGAL ARGUMENT

A. DEFENDANTS DID NOT REFUSE TO SELECT PLAINTIFF FOR "A TRAINING PROGRAM LEADING TO EMPLOYMENT" AND MS. MACK HAS NEVER BEEN PLAINTIFF'S SUPERVISOR

Plaintiff does not dispute that she has never been an employee of Defendant MERRITT COLLEGE or SHIRLEY MACK. Plaintiff also does not dispute that in order to recover under the provisions of FEHA, an aggrieved plaintiff must demonstrate the existence of an employment relationship. See *Vernon v. State of California*, 116 Cal.App.4th 114, 124 (2004); *Mendoza v. Town of Ross*, 128 Cal.App.4th 625, 631 (2005); *Shephard v. Loyola Marymount Univ.*, 102 Cal.App.4th 837, 842 (2002). Nevertheless, without any legal support, Plaintiff contends that she is entitled to pursue her FEHA claims because she "was in a contractual relationship with Merritt in what could be considered a 'training program' within the ambit of FEHA." (Plaintiff's Opposition at 2:16-17.)

Plaintiff's argument is contrary to the plain text of FEHA. The FEHA provides, *on its face*, that that it shall be an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire

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or employ the person **or to refuse to select the person for a training program leading to employment."** Government Code §§ 12940(a) (emphasis added).

Here, Plaintiff does not allege that Defendants refused to select her for any training program leading to employment. Further, Plaintiff has failed to proffer a single authority which provides that enrollment as a student in a community college is considered a "training program leading to employment" under the FEHA. Plaintiff's argument plainly lacks merit.

Moreover, Plaintiff failed to address the authority cited by Defendants, which clearly demonstrates that Plaintiff is not an "employee" for purposes of FEHA. In *Mendoza v. Town of Ross*, 128 Cal.App.4th 625, 631 (2005), the court sustained a demurrer without leave to amend on the grounds that the plaintiff, a volunteer Community Service Officer, was not an "employee" of the Town of Ross for purposes of FEHA despite the fact that he completed a "probationary period" and was sworn in as an officer. *Id.* at 637. The court held that "the absence of remuneration prevents him from attaining 'employee' status under the FHEA." *Id.* at 637. Here, Plaintiff does not allege that she ever received any remuneration whatsoever from Defendants. Accordingly, Plaintiff does not, as a matter of law, meet the definition of an "employee" for FEHA purposes.

Finally, Plaintiff's argument that Ms. Mack exercised "authority" over her thereby putting Ms. Mack "in a position of a supervisor for purposes of an employment relationship," is frivolous. Ms. Mack is one of several librarians who works at MERRITT COLLEGE and Plaintiff is one of hundreds of students that use the library. Plaintiff has never been employed by MERRITT COLLEGE and Ms. Mack has no authority to hire, fire or demote Plaintiff. Indeed, given that Plaintiff is a student of MERRITT COLLEGE and has never been an employee, the argument is nonsensical. Plaintiff's claims for violation of FEHA fail as a matter of law and must be dismissed without leave to amend.

B. PLAINTIFF HAS FAILED TO ALLEGE FACTS SUFFICIENT TO DEMONSTRATE COMPLIANCE WITH THE TORT CLAIMS ACT

Plaintiff contends that she pled facts sufficient to allege compliance with the Torts Claims Act because she alleged that she "exhausted her administrative remedies both with the

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Merritt College administration and government agencies, thereby obtaining her Right to Sue Letter alleged in the complaint." (Plaintiff's Opposition at 2:21-25.) In the first instance, Plaintiff's argument fails because her allegation that she *exhausted her administrative remedies with the Merritt College administration* is a legal conclusion, not a factual allegation. Accordingly, the court need not, and should not, accept the allegation as true. See *Beliveau v. Caras*, 873 F. Supp. 1393, 1395-1396 (C.D. Ca. 1995); *In re Delorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993).

In reality, Plaintiff failed to plead any facts demonstrating compliance with the essential contents of a claim, including: 1) the person to whom Plaintiff sent the notices; 2) a statement of the date, place, and circumstances of the occurrence alleged therein; 3) a description of the stated injury, damage, or loss alleged; 4) the name of the public employee who Plaintiff alleged caused the injury, if so alleged; 5) the amount Plaintiff claimed and whether she claimed it was to be a limited civil case; and 6) whether Plaintiff paid the requisite filing fee when she filed the claim. Government Code §§ 910, 905.2. Plaintiff also failed to allege the date on which the she allegedly presented her claim. This is because Plaintiff never presented a Claim in compliance with the Act.

Secondly, Plaintiff's assertion that she received a "Right to Sue Letter" from the Department of Fair Employment and Housing ("DFEH") must be disregarded as irrelevant to her claims for breach of implied-in-fact contract and negligent misrepresentation. The DFEH does not investigate such claims, and Plaintiff has proffered no authority which provides that obtaining a Right to Sue Letter demonstrates compliance with the Tort Claims Act.[1] Plaintiff's claims for breach of implied-in-fact contract and negligent misrepresentation are statutorily barred.[2]

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[1] As indicated previously, Plaintiff's obtaining of a Right to Sue letter from the DFEH is also irrelevant to her claim that she is an "employee" for purposes of FEHA given that she did not disclose her "student" status to the DFEH. Further, she requested an immediate right to sue letter, thereby preventing the DFEH from investigating her Complaint. (See Exhibits A(1) and A(2) to Plaintiff's First Amended Complaint.)

[2] Plaintiff's reliance on *King v. Ralston Purina Co.*, 97 F.R.D. 477, 479 (D.C. N.C., 1983), is misplaced. In the first instance, the defendant, Ralston Purina is not a public entity, and the case makes no reference whatsoever to the Tort Claims Act. *King* is further distinguishable from the instant case as there, the plaintiffs were *employees* of the defendant, not students.

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C. FURTHER AMENDMENT SHOULD NOT BE PERMITTED

Plaintiff's request to file a Second Amended Complaint should be denied. After Plaintiff filed her first Complaint, defense counsel promptly met and conferred with opposing counsel and advised him of the Complaint's legal deficiencies. Defense counsel requested that Plaintiff dismiss the case or amend the Complaint. Thereafter, opposing counsel agreed to file an Amended Complaint. (See Declaration of Alyson Cabrera at **Exhibit 1**.)

Although Plaintiff dropped from her Amended Complaint her claim for punitive damages against MERRITT COLLEGE (as they are barred under the Government Code), she failed to cure the other defects, and further added non-meritorious claims for violation of Section 1981. Thereafter, despite having a significantly extended period of time to oppose Defendants' Motion to Dismiss, Plaintiff gave short-shrift to the arguments presented therein. Plaintiff completely failed to oppose Defendants' arguments with respect to Plaintiff's claims for violation of Section 1981. She dedicated only one sentence to her claims for breach of implied-in-fact contract and negligent misrepresentation. She presented no legal authorities to substantiate her arguments.

This court need not assume that Plaintiff can prove facts different from those she has alleged. See *Assoc. Gen. Contractors of Calif. v. Calif. State Council of Carpenters*, 459 U.S. 519, 526 (1983). Moreover, under the circumstances, Plaintiff has not demonstrated that she is deserving of a third bite at the apple.

III. CONCLUSION

For all of the reasons stated herein, Defendants respectfully request that this Court dismiss Plaintiff's Amended Complaint with prejudice.

Dated: December 18, 2007

GORDON & REES LLP

By: /s/ Alyson Cabrera
ALYSON CABRERA
Attorneys for Defendants
MERRITT COLLEGE and
SHIRLEY MACK